

## **Prison cap foes step forward**

**Motions filed opposing three-judge federal panel that would look at inmate reductions.**

**By Andy Furillo - Bee Capitol Bureau**

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As California and the federal courts move into uncharted legal territory, sheriffs, prosecutors, probation officers and Assembly Republicans have filed motions to stop a special three-judge panel from imposing a population cap on the state's overcrowded prisons.

Gov. Arnold Schwarzenegger, meanwhile, is seeking an emergency stay order to prevent the panel from taking up the matter, pending the administration's appeal of the decision that created the panel in the first place.

Regardless of the decision on the stay request, the panel's hearings on the population cap appear to be months away, with the ultimate verdict even further out on the horizon. The inmates' rights lawyers seeking the cap are asking for a Dec. 3 hearing date. The state's attorneys don't want the hearings to begin until April 28.

With an appeal to the U.S. Supreme Court likely on any final decision rendered by the three-judge panel, the ultimate result on the population cap probably wouldn't be known for at least a year and possibly not until mid-2009, according to a top official in the state attorney general's office.

"It depends on how many cases the Supreme Court has on its calendar," said Frances Grunder, the head of the Department of Justice's correctional law unit. "If it doesn't get calendared for 2008, it would get pushed into the next term that begins in October 2008. Then the results would come sometime in 2008 or as late as June 2009."

In separate pleadings filed this week in federal courts in Sacramento and San Francisco, the prospective intervenors all asked that the three-judge panel refrain from imposing a prisoner release order until after the state's recently enacted \$7.9 billion prison construction plan "has been fully implemented and its efficacy can be fully and fairly assessed."

Their court papers also asked that the order be "narrowly drawn" so that it "extends no further than necessary to correct a violation of a federal right" and that it represents "the least intrusive means necessary" to achieve compliance.

U.S. District Court Judges Lawrence Karlton and Thelton Henderson on July 23 granted the inmates' rights lawyers' motion to establish the three-judge panel. The attorneys argued that the

court was needed to fix prison overcrowding, which they said was making the system's unconstitutional medical and mental health care conditions even worse.

Under the Prison Litigation Reform Act, state legislators, prosecutors and law enforcement officials and others are entitled to intervene in the case. In seeking intervenor status, the groups also are asking that the three-judge panel hold off on issuing a prisoner release order unless the plaintiffs show that it would fix the health care violations and that it wouldn't impact public safety in California.

Plaintiffs' lawyers have filed papers saying that the "maximum safe and reasonable" operating capacity of the prison system is just under 138,000. The California Department of Corrections and Rehabilitation currently houses about 173,000 inmates, meaning that the three-judge panel might be asked to consider releasing 35,000 inmates.

"It's going to mean that inmates who have already been determined to be a danger to this community and not appropriate for local supervision are going to be released," said Sacramento County District Attorney Jan Scully, one of the 15 prosecutors seeking to intervene in the case. "And we have thousands and thousands of felony probationers in our community now and in our local jails, and we're having challenges with crime as it is. This is not the right result or decision for judges to be making."

All but one of the Assembly's 32 GOP members signed on to be intervenors. Twenty-three sheriffs joined in their motion, as did the Chief Probation Officers Association.

Donald Specter of the Prison Law Office, one of the plaintiffs' lawyers who sought the three-judge panel, said "it's their right" to intervene. But he disputed the proposed population cap's impact on public safety.

"This can be done in a way that is targeted at the prisoners who present the least risk to public safety," Specter said. "It can be done in a way that makes it safer if we have the cooperation of the local communities, if (released inmates) are provided re-entry options."

Schwarzenegger's request for the stay with the 9th U.S. Circuit Court of Appeals also cites the public safety consideration, saying that the early releases "will likely result in criminal activity in local communities."

The Republican governor's motion says that Henderson and Karlton erred in setting up the three-judge panel and that the case has moved into "uncharted territory," with no case law to guide the courts. The appellate courts need to review "this nationally significant order," Schwarzenegger's lawyers argued, "to ensure the proper development of this unsettled area of law."

Professor Margo Schlanger, a prison litigation and constitutional law expert at Washington University School of Law in St. Louis, said the governor's appeal may be misplaced, that "the proper body to oppose the convening of the three-judge court is with the three-judge court itself."

"But if you can get two bites at the apple, why not try?" Schlanger said.

Schwarzenegger's lawyers contend that previous court remedies in the two cases, including the appointment of a receiver to oversee medical care, have not been given enough time to work. The medical care case was resolved in 2002, the mental health case in 1995.

If the judges didn't meet the criteria to establish the three-judge panel, then their decision is appealable, said Andrea Hoch, the governor's legal affairs secretary.

"This is unprecedented," Hoch said of the case. "California is once again on the cutting edge."